VIRGINIA LAW REGISTER

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The General Assembly of 1916.

The General Assembly meets on the 5th of this month. Probably one of the most important pieces of work before that body is to complete the prohibition of the sale of ardent spirits in pursuance of the vote of the people on that question. It is sincerely to be hoped that in drafting legislation on that subject there will be no ambiguity or clauses of doubtful construction such as have rendered the celebrated "Byrd Bill" a terror to every judge and attorney for the commonwealth who has had anything to do with it. A difficulty which needs wise statesmanship is to regulate the manufacture of domestic wines and the sale of cider. The sale of cider has proven in many communities a greater curse than even the sale of liquor under license. One city we wot of, found that the "cider joints" were perfect hells and in order to get rid of them imposed a tax of $1500.00 on the sale of cider. The "joints" immediately moved out into the county and it became necessary to invoke the "nuisance law" to close up the worst of them. Others are still running and doing a great deal of damage, but conduct themselves so as to skate too close to the bank to break the ice. A prohibition of the sale by the glass or in quantities less than five gallons might do good in this respect. In regard to the manufacture and sale of domestic wine, whatever legislation there is ought to be clear, explicit and without ambiguity, so that the honest manufacturer may know just what his rights are and not expose himself to the danger of prosecution.

The "Byrd Bill" in this respect has given no end of trouble. The Attorney General of the State held one way in regard to such sale; several of the courts held otherwise. Good, honest, high-minded men engaged in the manufacture and sale of good, pure, honest wine took advice of counsel who held the same

views with the Attorney General. In two instances we know of, men who had thus acted were persecuted by men zealous in the cause of prohibition of the sale of any sort of wines or spirituous liquors and the court with great reluctance felt itself constrained to hold that these gentlemen had violated the law and they were found guilty and fined accordingly.

No such statute ought to be permitted. Men are entitled to clear, unambiguous laws and it is to be hoped that whatever legislation is enacted will be such that the most foolish wayfaring man may understand, and "that he who reads may run" into no danger.

Code Revision.

The Act approved February 5th, 1915, amending the Act of March 21st, 1914, providing for the revision, codification and indexing of our statute law does not limit the revisors as to the time in which they shall make their report, and we do not know as to whether any report will be made to the present General Assembly. We would most respectfully suggest to the General Assembly that if no report is to be made the Act should be again amended in two respects: One, that in addition to collating, revising and codifying the general statutes, the Commissioners should be authorized to suggest such changes in the statutes as they deem wise and to recommend such new legislation as will in their opinion further the cause of clearness and unambiguity in the laws and aid in the furtherance of justice and good government.

Such power might possibly be presumed from that language in the Act which provides that "they shall in all respects execute and complete the revision and codifications as hereby directed, in such manner as, in their opinion, will harmonize the general statutes and make the Code of Statute Law, as existing at the close of their work, as complete as possible."

If the Commissioners take the view that this language authorizes them to make changes and suggest new legislation, then there will be no necessity of any amendment; but to remove any doubt and to silence all captious criticism we think an amendment as suggested would not be unwise.

The other suggestion we desire to make is that the public printer be allowed to bind one-half, or more, of the Code in "Buckram" and not the entire edition in calf, as the present act requires. Calf is fast becoming obsolete as the binding for law books. It is vastly inferior to buckram, both as to wear and appearance, and we believe is dearer. Most lawyers prefer books bound in good buckram to those bound in calf, and we believe the Code would sell better, look better and wear better in the latter binding.

Our County Court Records.

Virginia has a wealth of historical matter hidden away in its clerks' offices. Much of it is neglected, uncared for and rapidly going to ruin. Of all the people in the world Virginians are the most careless as to their own proud history and the lack of interest in the proper preservation of their records is to be much deplored. We know of one instance where one of the colonial records of one of our counties was found, its backs broken, covers gone, the valuable pages tied up with a rope and thrown under the table on the floor where dust and tobacco juice might soon have ended its usefulness. "Old trash," it was called by its so-called guardian.

Now something ought to be done to preserve these papers and at the present session of the General Assembly a bill will be introduced providing for the publication of a supplemental volume of the Calendar of State Papers under the direction of the State Library Board. The purpose of this bill is to authorize the compilation of a strict inventory of the chief contents of the clerks' offices of the counties of Virginia, with notes as to the physical condition of the records and as to the methods in force for handling and preserving them to the best advantage, an experienced agent to be appointed to compile this inventory. We have been favored with a communication on this subject from Mr. A. J. Morrison, of Hampden-Sidney, Virginia, who has done much valuable historical work and also looked into the condition of the records in many counties. With due acknowledgment to Mr. Morrison we wish to make this communication a part of this editorial, hoping it may attract the attention of our law

makers and persuade them to pass the bill in question. The work can be done for a very few thousand dollars.

The article is as follows:

"In view of the fact that Virginia is the oldest of the English-speaking commonwealths of America, the public records of the State have a value not only within its borders but to the world at large. As early as 1873 the importance of the preservation, arrangement, etc., of the State papers of Virginia was considered by the General Assembly, with the result that an Act was passed (Acts of Assembly 1872-73, ch. 210 (p. 192)—) providing for the preservation of historical papers, Dr. Wm. R. Palmer being appointed to take charge of the historical manuscripts in the Capitol building, under the direction of the Secretary of the Commonwealth, to assort, index, and prepare a Calendar of the same. This work was carried on by Dr. Palmer, Sherwin McRae, and the Hon. H. W. Flournoy, until in 1893 eleven volumes of the Calendar had been published, a series of the greatest interest and value, possessed, no doubt (and often consulted) by every great library—A movement worthy of the State.

"At pages XXIV and XXV of Dr. Palmer's Calendar, the subject of the County records of Virginia is touched upon—it is pointed out that the County records throughout the State are, considering their importance, not always preserved in a manner to guard them from damage; that deposited among them may often be found material that rightly should be eliminated from the Clerks' offices, and more appropriately disposed of. Much has been done since the invaluable Calendar of State Papers was undertaken; public opinion has become very generally aroused as to the necessity for improved methods in regard to the storage and treatment of such records as those in the Clerks' offices of the Counties. By an Act of Assembly of March 1, 1892, authorization was given to copy certain damaged records in the older Counties. In 1905, the State Librarian in his report gave a brief summary (pp. 94-96) of the conditions obtaining in the Counties with respect to the preservation of their records. Within very recent years other States (notably Massachusetts) have established Commissions to supervise strictly all such matters as the handling of public records throughout the limits of the State. Records of this character, that is to say, are emphatically a public trust of the most serious nature. The safety of the books and papers of a County a hundred miles away is, in the last analysis, a matter of very considerable importance to those who have no sort of immediate interest

in that County. Whether the citizen of Bath County came from Isle of Wight or not, the records of Isle of Wight County are a part of his inheritance.

"The exact physical condition of the County records of Virginia is a subject of direct practical importance, as well as of great interest. A thoroughgoing inventory of the chief contents of the Clerks' offices of the State, published as a State document, would form in many quarters a manual of great usefulness. The following is a suggestion of a plan for such an inventory:

"I. COUNTY COURT MATERIAL.

"Books: A. I. Deed Books.
a. D. B. S. Dockets.
b. Processioners' Returns.
c. Land Books.
"II. Will Books.
a. Guardians' Accounts.
"III. Order Books.
"IV. Bond Books.
(Especially Warehouse Inspectors' Bond Books.)
"V. Registers.
a. Marriages.
b. Births and Deaths.
c. Muster Rolls.
d. Estrays and Advertisements.
e. Tithables.
"B. Papers: Law and Chancery.
a. Inventories, reports, etc.
"II. District Court and Circuit Superior Court Material.
"A. Books. B. Papers.
"III. Extraneous Material (To be transferred when possible.)

"This scheme, or any adopted, to be followed strictly, showing at a glance the resources, and the losses, of any specific County. The report also to embody notes regarding the methods in force as to the safe and convenient handling of the records. Such an inventory in short to be a preliminary step towards the securing of uniform, approved methods, in all the Counties of the State. Where the objects to be attained are of such extreme importance, delay cannot be the best course of action. * * * Should the examination proceed beyond the period of the County Court system, additional items, of course, must be included—e. g. Supervisors'

Books. It might be well to restrict this examination to the period before 1870.

"In view of the facts set forth is offered:

"A bill providing for the publication of a supplementary volume to the Calendar of State Papers, under the direction of the State Library Board.

"The purpose of this bill is to authorize the Compilation of a Strict Inventory of the Chief contents of the Clerks' offices of the Counties of Virginia, with notes as to the physical condition of the records and as to the methods in force for handling and preserving them to the best advantage. An experienced agent to be appointed ——— to compile this inventory."

The Migratory Bird Law.

In an editorial on page 634 of Volume XIX we called attention to what was in our opinion the unconstitutionality of this law—March 4th, 1913, 37 Stat. 847. In a case from the eastern district of Arkansas, *U. S. v. Shauver,* 214 Fed. 154, the act was held unconstitutional, and an appeal taken to the Supreme Court of the United States. *U. S.* v. *McCullagh,* 221 Fed. 288, decided by the District Court of Kansas, takes the same view of the Arkansas Court and holds that such an act is beyond the powers of the United States Government and that neither the power to regulate interstate commerce nor the "general welfare" clause of the Constitution permitted the general Government to regulate the shooting or hunting or taking of game and fish in the several states.

In the case of *Ward* v. *Race Horse,* 163 U. S. 504, the Supreme Court decided that the State of Wyoming had the right and power to regulate the hunting and sale of game within its borders, a treaty of the United States with the Bannock Indians, giving them a right to hunt game in the Territory of Wyoming to the contrary, notwithstanding.

The Shauver case has been argued and submitted and we await with much interest the decision of the Supreme Court. We believe it will follow the lower court and its own decision in *Ward* v. *Race Horse, supra;* but one can never tell now-a-days.

Suits against the States.

Were we disposed to be slangy we would say that the eleventh Amendment to the U. S. Constitution received quite a "jolt" in the decision in *Traux, &c.*, v. *Raich,* decided November 1, 1915, by the Supreme Court of the United States. The State of Arizona, by an initiative, adopted a law providing that any company, corporation, individual, etc., etc., employing more than five workers at one time, must employ at least eighty per cent of such workers who should be qualified electors, or native-born citizens of the United States, or some sub-division thereof. Mike Raich, a native of that land whose submarine torpedoed the Ancona, not a qualified elector, was employed in the capacity of a cook by Truax, who had nine employees, of whom seven were neither "native-born" citizens of the United States, or qualified voters. When the act was passed Truax informed Raich he would be fired as soon as the law was proclaimed. Raich thereupon filed a bill in the District Court of the United States, for the District of Arizona, asserting among other things that the act denying to him the equal protection of the laws was contrary to the 14th Amendment. He made the Attorney General of the State and the County Attorney of the County wherein he and Traux lived, defendants, alleging they would prosecute his employer unless he was discharged, and that to avoid such a prosecution his employer was about to discharge him. Averring that he had no adequate remedy at law, the bill sought a decree declaring the act unconstitutional and restraining action thereon.

It was moved to dismiss the bill on four grounds: (1) That the suit was against the State of Arizona without its consent; (2) that it was sought to enjoin the enforcement of a criminal statute; (3) that the bill did not state facts sufficient to constitute a cause of action in equity; and (4) that there was an improper joinder of parties, and the plaintiff was not entitled to sue for the relief asked.

The court overruled all the objections and perpetuated an injunction, holding the first ground untenable upon the theory that the act was unconstitutional and the defendant public officers were about to proceed wrongfully, to the injury of Raich, by interfering with his employment. *Ex parte Young,* 209 U. S. 123, and various cases following it.

The second ground was that equitable jurisdiction exists to enjoin criminal prosecution under unconstitutional enactments when prevention of such prosecutions is essential to safeguarding the rights of property. *Davis, etc.*, v. *Los Angeles,* 189 U. S. 207, and various cases. The other two objections were sufficiently answered by the first two points decided.

Mr. Justice McReynolds dissented as to the opinion, though concurring in the result. We give his opinion, with which we most heartily concur, in full:

> "I am unable to agree with the opinion of the majority of the court. It seems to me plain that this is a suit against a state, to which the 11th Amendment declares "the judicial power of the United States shall not be construed to extend." *Fitts* v. *McGhee,* 172 U. S. 516, 43 L. Ed. 535, 19 Sup. Ct. Rep. 269. If *Ex parte Young,* 209 U. S. 123, 52 L. Ed. 714, 13 L. R. A. (N. S.) 832, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764, and the cases following it support the doctrine that Federal courts may enjoin the enforcement of criminal statutes enacted by state legislatures whenever the enjoyment of some constitutional right happens to be threatened with temporary interruption, they should be overruled in that regard. The simple, direct language of the Amendment ought to be given effect, not refined away.
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> That the challenged act is invalid I think admits of no serious doubt.

We believe with the distinguished Justice that it is about time to overrule *Ex parte Young,* and go back to the great basic principles upon which this Government is formed. One suit caused the 11th Amendment. *Ex parte Young* ought to cause another broad enough to protect the States from being sued indirectly—just what was done in the present case.